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No. 90-520

In the Supreme Court of the United States

OCTOBER TERM, 1990

TOWN OF RYE, NEW YORK, ET AL., PETITIONERS

v.

SAMUEL K. SKINNER,
SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the National Environmental Policy Act of 1969, 42 U.S.C. 4332, *et seq.*, requires an agency to subject its proposed decision, and the bases for the decision, to public comment before issuing a finding of no significant environmental impact.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A6), which was issued on consolidated direct review of the agency decisions, see Federal Aviation Act of 1958, 49 U.S.C. App. 1486, is reported at 907 F.2d 23.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1990. The petition for a writ of certiorari was filed on September 24, 1990 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case arises from a proposal by Westchester County to replace the terminal and associated facilities at Westchester County Airport (the Airport), which the County owns and operates. Petitioners challenged the procedures used by the FAA in approving the project under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332 *et seq.*, and associated FAA regulations, Federal Aviation Orders 5050.4A (1985) and 1050.1D (1983).[1] The case originated in the court of appeals on direct petition for review of two FAA orders: the Record of Decision (ROD) approving, *inter alia*, the replacement of the terminal and improvement of parking facilities, and the approval of the Airport Layout Plan (ALP), a map (C.A. App. A374) reflecting the proposed new projects. The two petitions, which raised identical legal issues under NEPA, were consolidated below.

The proposal that is the subject of the FAA's review is the replacement of the current 10,000 square foot terminal at the Airport—a World War II quonset hut moved to the site in 1946 (EA Vol. I at 1-1)[2] —with a 43,000 square foot modern terminal.[3] Due

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[1] FAA orders cited herein are contained in a separate addendum of statutes and regulations in the court of appeals.

[2] The five volumes of the Environmental Assessment are not consecutively paginated. Each volume is divided into chapters and the page numbers begin anew at the start of each chapter. Thus, "EA Vol. I at 1-2" refers to Chapter 1, page 2, (*not* to pages 1 and 2). Multiple pages are cited, for example, as "EA Vol. I at 1-2 through 1-4" or "1-2 and 1-4").

[3] The Environmental Assessment contains a consultant's description of the need for the proposed project. EA Vol. I at 1-14:

> The usual comments made by the air traveler about [the existing] facilities at Westchester County Airport should

to the limited space and short runways, the Boeing 737 is the largest aircraft the Airport can regularly accommodate, but there is no proposal to increase the length or number of runways at the airport or to increase gates at the terminal. See *id.* at 1-13. The current caps on aircraft size, which the proposed improvements will not change, limit not only the number of passengers, but the destinations that can be reached from Westchester.

1. a. Westchester County submitted a proposed terminal replacement project to the FAA, which was required to review the proposal for its environmental impacts under NEPA.[4] Normally, the FAA is not required to conduct a formal environmental assessment for passenger handling facilities. See FAA Order 5050.4A (23).[5] Because of the interest in the

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not be repeated in polite society and shall not be stated in this professional document. One need only visit the airport once as a traveler to immediately share the "experience" of all who have gone before.

The passenger terminal building is often quaintly described as a quonset hut; indeed, it is just that, having been brought to its present site from Guam in 1946. The hut is hardly quaint; it is dysfunctional as a passenger processing facility, providing scarcely any essentials and none of the amenities expected by a civilized society.

[4] Approval by the FAA is required for changes in a federally-obligated airport that might affect the safety, efficiency, or utility of the airport. FAA approval is reflected on the Airport's ALP, or Airport Layout Plan, a map of the airport showing the current or approved facilities.

[5] In the NEPA context, a "categorical exclusion" is a discrete class of actions identified by the agency as not normally causing significant environmental effects. Agencies are required by the Council on Environmental Quality (CEQ) regulations, 40 C.F.R. 1507.3, to promulgate regulations, subject

project in the surrounding communities, however, the FAA chose to prepare an assessment of the potential environmental effects of the proposed terminal project and the ancillary projects. See FAA Order 5050.4A(24(b)).

The County, as the sponsoring agency, produced for the FAA's use a joint federal environmental assessment and New York State environmental impact statement.[6] The County circulated this document to the States of New York and Connecticut, to all of the affected towns (including petitioner towns), and to local libraries and interested organizations and individuals. EA Vol. VI, Doc. 1 (transmittal letter).

In total, the County prepared three major studies of the Airport improvement project for public comment: a February 1987 Master Plan Update Study/Environmental Assessment/Final Generic Environmental Impact Statement (EA Vol. V); an August 1988 Draft Environmental Assessment and Environmental Impact Statement (EA Vol. IV); and a November 1988 Environmental Assessment and Final Environmental Impact Statement on the Terminal Facilities Modernization Project (EA Vols. I-III).

b. Formal public participation began in August 1986, when the County's consultant notified 28 state, local, and federal agencies of the proposal to prepare an environmental assessment/environmental impact

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to full notice and comment, listing their categorically excluded actions. Actions that fall within a categorical exclusion are generally entirely exempt from NEPA analysis.

[6] The County chose voluntarily to comply with the environmental impact statement requirements under the State Environmental Quality Review Act (SEQRA), art. 8, N.Y. Envtl. Conserv. Law, §§ 8-0101 to 8-0117 (McKinney 1984 & Supp. 1990).

statement for improvements to the Airport. EA Vol. V, App. C. On November 13, 1986, the County held a public hearing, attended by more than 300 people (including some of the petitioners), to discuss the draft of the Master Plan Update Study (ultimately released in February 1987). See Supplementary Material, *id.* at 6-1 through 6-2. The County accepted written comments on the draft for two weeks thereafter. *Ibid.*

In August 1988, the County prepared and circulated the Draft Environmental Assessment/Envirmental Impact Statement to an expanded mailing list, including petitioners. See EA Vol. VI, Doc. 1 (transmittal letter from Westchester County dated August 25, 1988, with attached list of addressees). On October 4, 1988, the County held another public hearing (attended by more than 200 people). EA Vol. II at 6-1. Among the commentators (at both hearings) were some of the petitioners, represented by counsel and their own elected representatives. The County also announced that it would accept additional written comments on this draft for two weeks thereafter. *Ibid.* In November 1988, the County issued the Final Environmental Assessment/Environmental Impact Statement, including all the prior comments submitted on the draft, and responses to them. EA Vols. I-III.

Although not required to do so by the regulations, the agency also prepared a "Preliminary Analysis" of the Environmental Assessment in order to provide the public with an additional opportunity for comment before the decision was made whether or not to prepare a full-fledged environmental impact statement. The Preliminary Analysis used the information in the environmental assessment, an FAA com-

missioned noise analysis, and various comments received by the County on the draft to reanalyze the possibility of significant impact of the project. See C.A. App. A123-A144. The Preliminary Analysis was circulated for comments to a total of 111 interested persons, agencies, and municipalities, including many, if not all, of the petitioners, as well as to the public libraries in the towns nearby the airport. See Distribution List for Preliminary Analysis, EA Vol. VI, Doc. 2.

The FAA received a large number of comments on the Preliminary Analysis, including extensive comments from petitioners' counsel on their behalf. Those comments raised before the federal agency for the first time certain issues concerning the methodology used to forecast the airport's likely traffic with and without the terminal. C.A. App. A145-A168. As a result, the agency prepared a traffic forecast using methods suggested by commentators.[7] On May 15, 1989, the agency notified many of the commentators, including petitioners, that "some issues raised do deserve further analysis and that analysis has begun. If the analysis shows that our preliminary findings are invalid or otherwise require change, we will not hesitate to make those adjustments for our final findings." EA Vol. VI, Doc. 3.

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[7] As requested by petitioners in their comments, the agency conducted an analysis based on market penetration, see C.A. App. A158-A160, and shorter turnaround times at the gates, see *id.* at A154-A156. The only significant comment rejected by the agency in analyzing Airport traffic was the suggestion to ignore the number of gates available at the Airport on the theory that aircraft could be loaded and unloaded on the tarmac by walking passengers some distance to and from waiting aircraft. *Id.* at A153-A154.

c. On November 30, 1989, the FAA rendered its final decision in two documents—the Record of Decision (ROD) (Pet. App. A7-A14) and the Finding of No Significant Impact (FONSI) (*id.* at A15-A45), which were the subject of petitioners' first petition for review. Both documents attached a copy of the FAA's "Demand, Capacity and Operational Analysis of Westchester County Airport Terminal Facilities Modernization Project Environmental Assessment." *Id.* at A49-A62. On the basis, in significant part, of the factors recommended by petitioners, this analysis concluded that the proposed new terminal would not result in a significant increase in airport traffic because (1) traffic is a function of demand and physical constraints on airport use (runways, gates) (*id.* at A50-A52); (2) demand varies according to flight availability and destinations, not terminal comfort or aesthetics (*id.* at A7-A8); and (3) as a physical matter, the old terminal, though uncomfortable and less safe, could accommodate the projected demand. *Id.* at A60. This last conclusion is based on the agency's knowledge, from its experience with overcrowded airports, that peaks in traffic can, and will be, accommodated by "peak spreading"—that is, the movement of flights from high demand time periods into adjacent time periods.

Shortly thereafter, on February 28, 1990, the FAA issued its approval of the Airport Layout Plan for the terminal modification projects, C.A. App. A335-A337, A374,[8] which petitioner challenged in its sec-

[8] The approval noted that the FAA would be required to conduct additional environmental review should certain steps be taken or proposed that could increase the airport's air traffic capacity, including "longer/stronger runways; additional aircraft gate position[s]; increased terminal ramp

ond petition for review.[9]

2. In the court of appeals, petitioners challenged the lawfulness of the procedures used by the FAA in issuing the Record of Decision and the Finding of No Significant Impact and in approving the Airport Layout Plan.[10] Specifically, petitioners contended that the FAA had violated procedures required by NEPA and FAA regulations by failing to circulate the "Demand, Capacity and Operational Analysis" prepared in response to petitioners' comments on the FAA's Preliminary Analysis, and that the FAA had failed to follow its own regulations requiring state and local review of certain proposed projects. Pet. C.A. Br. 22-29. Petitioners further argued that the FAA's determination that the proposed project would not

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strength and capacity; or a deviation from FAA dimensional standards, that has the potential for increasing the capability to accommodate more or larger aircraft." C.A. App. A336. See Pet. App. A8.

[9] On November 7, 1990, a County referendum resulted in voter approval for a bond issue to finance a 41,000 square foot terminal. It is our understanding that the County now proposes to build this somewhat smaller terminal.

Other improvements submitted for approval as part of the Airport improvement project include: a new indoor parking facility and rental car offices; a new perimeter road system to prevent vehicles from having to cross active runways; replacement of existing crash-fire-rescue facilities; a new runway lighting system; and clearance of obstructions on property adjacent to the airport at the end of the runways. None of these ancillary projects has been challenged by petitioners.

[10] Before the court of appeals, petitioners also argued that the challenged FAA actions were not ripe for review because no funding for the Airport project had actually been approved. The court of appeals rejected this argument, and petitioners do not renew it in this Court.

create any significant environmental impacts was arbitrary and capricious. *Id.* at 29-45.[11]

In a per curiam opinion, the court held that petitioners' "claim that the FAA violated the National Environmental Policy Act * * * by failing to circulate for public comments its independent analysis of the likelihood that a new terminal will result in increased Airport use" is "without merit" because the agency "more than complied" with all statutory and regulatory requirements. Pet. App. A4. As the court explained (*ibid.*):

> the FAA and Westchester County conducted public hearings and received written comments on every draft environmental assessment; the FAA circulated for comment its Preliminary Analysis of the environmental assessment; and the FAA's independent analysis itself was done in response to comments of petitioners. NEPA requires no more.

The court also held that the record did not support petitioners' claim that the required "state and local review process" did not take place. The FAA's obligations in this area were satisfied by sending the

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[11] Petitioners faulted the agency's assessment of the environmental impact of the project on the grounds that (1) the FAA failed adequately to account for potential cumulative effects of an independent Postal Service facility that the government was tentatively planning to build on adjoining land; (2) a finding of no significant impact under federal law was, by definition, inconsistent with the County's determination that an environmental impact statement was necessary under New York State law; (3) "simple logic" dictated a finding of significant potential impacts; (4) public controversy concerning the project required a finding of significant impact; and (5) the Environmental Assessment's discussion of alternatives was inadequate.

draft environmental assessment to the designated New York "single point of contact" for state and local review purposes, and by obtaining comments from local governments and concerned citizens at several points in the review process. Pet. App. at A4-A5.

Finally, the court of appeals rejected each of petitioners' attacks on the merits of the FAA's decision of no significant environmental impact, holding that (1) the FAA examined "in some detail" the potential cumulative impacts of the Postal Service facility, which, in any event, might never be built; (2) the FAA considered public controversy by subjecting this proposal to an environmental assessment not strictly required by NEPA or FAA regulations; and (3) the consideration of alternatives in the Environmental Assessment was adequate, given the agency's valid finding of no significant impact. Pet. App. A5-A6.

ARGUMENT

This case does not warrant the Court's review for two reasons. First, there is no merit to petitioners' argument that the procedures followed by the agency in approving the Westchester Airport project violated a supposed "rule of fundamental fairness." Pet. 24-34. Second, petitioners' "fundamental fairness" argument was neither presented to, nor considered by, the court of appeals, and is made for the first time before this Court.

1. In a long line of cases interpreting the obligations of agencies under NEPA, this Court has consistently held that "the only procedural requirements imposed by NEPA are those stated in the plain language of the Act." *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 548 (1978); *Robertson* v. *Methow Val-*

ley Citizens' Council, 109 S. Ct. 1835, 1847 (1989) ("NEPA does not require agencies to adopt any particular internal decisionmaking structure," quoting *Baltimore Gas & Elec. Co.* v. *Natural Resources Defense Council, Inc.* 462 U.S. 87, 100 (1983)); *Kleppe* v. *Sierra Club*, 427 U.S. 390, 406 (1976) ("The procedural duty imposed upon agencies * * * is quite precise, and the role of the courts in enforcing that duty is similarly precise.").

Petitioners challenge the procedures followed by the FAA in this case in preparing an Environmental Assessment. But, an Environmental Assessment is not a document required by the terms of NEPA. These assessments are purely creatures of agency regulations designed to help the agency decide whether the triggering event for NEPA—the existence of a proposal for "major Federal action[] significantly affecting the quality of the human environment"—has occurred. Only if a project is found to have a significant expected environmental impact does NEPA require the agency to prepare and circulate for public comment a "detailed statement" on the environmental effects of the proposal and reasonable alternatives to it. 42 U.S.C. 4332(C). The "detailed statement," known as an environmental impact statement, or EIS, must be circulated in draft for public comment before issuance in final form. See *ibid.*

The FAA did not prepare an EIS here. It prepared an "environmental assessment" for the sole purpose of evaluating whether the effects of the proposed Airport project would be sufficient to warrant the preparation of an EIS. The FAA concluded that the effects would not be significant, and issued a Finding of No Significant Impact and a Record of Decision reflecting its approval of the project for further

processing in accordance with the FAA's statutory mandate.

Although NEPA is silent on the procedures that must accompany preparation of an environmental assessment, the FAA's obligations at this stage are spelled out with specificity in the Council on Environmental Quality's (CEQ) regulations (see 40 C.F.R. 1500 *et seq.*), supplemented by the FAA's own regulations (contained in FAA Orders 5050.4A and 1050.1D). Nowhere do any of these regulations require the federal agency to circulate an environmental assessment—or any part of it—for public comment before finalizing the assessment, nor do they require the agency to circulate the draft or final assessment for public comment before making a decision whether to prepare an EIS or to issue a finding of no significant impact. 40 C.F.R. Pt. 1501.[12] At most, the regulations direct the agency to "involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments." 40 C.F.R. 1501.4(b). The FAA's regulations are consistent with this directive, holding that the agency retains discretion to schedule public hearings during the preparation of an environmental assessment, if "appropriate" under CEQ regulations (see FAA Order 5050.4A § 49(b) and (e)), and requiring "state and local review" at appropriate times during the planning process (see *id.* § 48).

In contrast, the CEQ regulations specifically direct the agency to invite comments following the comple-

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[12] In certain circumstances, not relevant here, the regulations require the agency to circulate the Finding of No Significant Impact for 30 days before making its final determination concerning the significance of any impacts. 40 C.F.R. 1501.4(e)(2).

tion of every draft EIS.[13] There is no counterpart to the EIS comment procedure for environmental assessments under CEQ regulations or, for that matter, under the supplemental FAA regulations, and petitioners cite to none. Moreover, petitioners do not dispute in this Court that the FAA complied with the letter of the regulations that apply to environmental assessments.[14]

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[13] The agency must invite comments on the final draft EIS from affected state, local, and Indian interests, the applicant (if there is one), and the public. 40 C.F.R. 1503.1(a)(1)-(4). The agency must consider those comments, and respond to them in the final statement. 40 C.F.R. 1502.9(b).

FAA regulations elaborate on CEQ's requirements. Like its CEQ counterpart, FAA's "Airport Environmental Handbook" (FAA Order 5050.4A) contemplates a full opportunity for written public comments on every draft environmental impact statement (§§ 90-93), but does not require circulation and comment opportunity following preparation of environmental assessments. See FAA Order 5050.4A §§ 43-52. FAA's "Policies and Procedures for Considering Environmental Impacts" (FAA Order 1050.1D) also contemplates full notice and public comment on draft impact statements, but not environmental assessments. FAA Order 1050.1D. Compare Chart 1 of Attachment 1 (EA processing does not require public comment) to Chart 3 of Attachment 1 (EIS processing requires opportunity for review and comment by public).

[14] Nor could they. The record demonstrates that the state and local review process mandated by FAA regulation (FAA Order 5050.4A § 48), plus *two* public hearings, did take place. Westchester County circulated the February 1987 draft of the environmental assessment to the State Clearinghouse, as well as to dozens of other interested individuals, groups, agencies and municipalities, including petitioners. EA Vol. VI, Doc. 1. The County received, responded to, and transmitted to the FAA all of the comments received in this process. See, *e.g.*, EA Vol. I, ch. 5.

Under this Court's decisions, agencies may not be required to follow procedures over and above those mandated by NEPA or its implementing regulations. Similarly, in construing the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, this Court has specifically disapproved the notion that agencies must comply with procedures required neither by the Due Process Clause of the Constitution nor by statutes or regulations.

As recently as last Term, in *Pension Benefit Guar. Corp.* v. *LTV Corp.* (*PBGC*), 110 S. Ct. 2668 (1990), this Court reaffirmed that principle. In *PBGC*, respondents challenged the failure of the Pension Benefit Guaranty Corporation to provide interested parties an opportunity to comment on the materials on which PBGC relied in reimposing pension plan obligations on respondent LTV Corporation following its reorganization. Like petitioners here (Pet. 24-25), some of the respondents in that case relied on *Bowman Transp., Inc.* v. *Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 288 n.4 (1974), to argue that the procedures followed by the PBGC were unfair.

This Court rejected that contention and distinguished *Bowman*, which involved a failure to permit comment in the context of a formal adjudication pursuant to the trial-type procedures of the APA under 5 U.S.C. 554, 556-557.[15] *PBGC* v. *LTV*, 110 S. Ct. at 2680-2681. The Court held that for informal agency adjudications, the only procedural requirements are

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[15] As this Court noted, those sections of the APA "include requirements that parties be given notice of 'the matters of fact and law asserted,' § 554(b)(3), an opportunity for 'the submission and consideration of facts [and] arguments,' § 554(c)(1), and an opportunity to submit 'proposed findings and conclusions' or 'exceptions,' 557(c)(1), (2)." 110 S. Ct. at 2681.

those set forth in 5 U.S.C. 555. A failure to follow more elaborate procedures, where "the Due Process Clause itself does not require them * * * is therefore not unlawful." 110 S. Ct. at 2681.

Petitioners here make exactly the arguments the Court rejected in *PBGC*. Petitioners seek to bring themselves within the "fundamental fairness principles found in *Bowman* and elsewhere" (Pet. 33) by relying on the Court's statement in that case that "[a] party is entitled * * * to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies." As the Court in *PBGC* held, that statement applies only in the context of "formal adjudication * * * pursuant to trial-type procedures set forth in §§ 5, 7 and 8 of the APA," which contain specific requirements for notice and opportunity for comment that go far beyond those imposed by NEPA or the regulations applicable in this case. 110 S. Ct. at 2680-2681. And, as with *PBGC*, this is not a case where the Due Process Clause requires additional procedures, and petitioners do not suggest that it is. Nor, as we have explained, is it a case in which any statute or regulation requires the procedures petitioners demand here.[16] For

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[16] Petitioners cite a number of court of appeals and district court cases (Pet. 28-32) for the proposition that courts, in the name of "fundamental fairness," have required procedures in addition to those undertaken by the FAA. Their citations are widely off the mark. *National Wildlife Fed'n* v. *Burford*, 835 F.2d 305 (D.C. Cir. 1987), see Pet. 29, was an appeal from a grant of a preliminary injunction, not a decision on the merits, and was, in any event, reversed last Term by this Court in *Lujan* v. *National Wildlife Federation*, 110 S. Ct. 3177 (1990). In *Lujan*, this Court held that the plaintiff in that case lacked standing to sue. Petitioners therefore

these reasons, petitioners' arguments are without merit, and there is no warrant for further review by this Court.

2. This Court should also decline to review this case because petitioners' arguments were not fairly

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err in suggesting that the court of appeals' decision in that case remains good law.

Petitioners also err in relying on a number of lower court NEPA decisions, including *Essex County Preservation Ass'n* v. *Campbell*, 399 F. Supp. 208 (D. Mass. 1975), aff'd, 536 F.2d 956 (1st Cir. 1976). All of those cases involve the public participation requirements for the preparation of an environmental impact statement, not an environmental assessment. As we have explained, the procedures required for an EIS are far more elaborate than for an EA.

Also inapposite is *Independent U.S. Tanker Owners Comm.* v. *Lewis*, 690 F.2d 908 (D.C. Cir. 1982). See Pet. 28. In that case, the court found that the United States Maritime Administration unlawfully failed to disclose a report containing the facts and reasoning on which it based an informal adjudicatory approval of certain maritime applications. Here, in contrast, the FAA fully complied with any applicable requirement that it circulate its decision, with reasons, and identify the material on which it was based. The Demand, Capacity and Operational Analysis (Pet. App. A49-A62), which spells out the agency's assessment of the effects of the project and is the focus of petitioners' challenge, was attached both to the agency's lengthy FONSI (*id.* at A15-A48), and to its ROD (*id.* at A7-A14). Both of the latter documents are public documents that were widely circulated.

Finally, petitioners cite (Pet. 25-27) *United States Lines, Inc.* v. *Federal Maritime Comm'n*, 584 F.2d 519, 534 (D.C. Cir. 1978), and cases cited there, for the unremarkable proposition that, in informal adjudication and rulemaking, agencies may not rely on information in their files without informing interested parties of the data they have utilized. That case says nothing to suggest, as petitioners contend, that agencies must, in informal contexts, circulate the data on which they ultimately rely for public comment *before* reaching their decision.

raised below. Petitioners articulated two substantive issues for the court of appeals to review, neither of which alleged any violation of a "rule of fundamental fairness." Nor did their briefs present this issue in any form: in 72 pages of briefing, the words "fundamental fairness" never appear. Instead, petitioners urged that the FAA's actions violated NEPA and the agency's own regulations, and it was on the basis of these arguments that the court of appeals ruled. Petitioners may not now seek this Court's review of issues they did not properly raise below. *Rogers* v. *Lodge*, 458 U.S. 613, 628 n.10 (1982); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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